Blank Page

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 61

BEST & COMPANY, INC.,

Appellant,

vs.

A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

STATEMENT AS TO JURISDICTION.

LORENZ REICH, JR.,
Counsel for Appellant.

STRAUSS, REICH & BOYER,
MANLY, HENDREN & WOMBLE,
Of Counsel.

Blank Page

INDEX.

Subject Index.

Appendix.

Table of Cases Cited.

STATUTES CITED.

MISCELLANEOUS.

IN THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1939.

No. 451

Wake Seventh District.

BEST & COMPANY, INC.,

vs.

A. J. MAXWELL, COMMISSIONER OF REVENUE.

JURISDICTIONAL STATEMENT.

Best & Company, Inc., plaintiff in the above entitled cause and applicant for the allowance of an appeal to the Supreme Court of the United States from the Supreme Court of the State of North Carolina, contends and respectfully represents that the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment herein is as follows:

I.

Statutory Provision Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction is section 237 (a) of the Judicial Code, as amended, 28 U. S. C., § 344(a).

The case is one in which, under the legislation in force when the Act of Congress of January 31, 1928, was passed, a review could be had in the Supreme Court of the United States on writ of error, for which remedy an appeal has been substituted.

Act of January 31, 1928, as amended by the Act of April 26, 1928, 45 Stat. 54, 466, 28 U. S. C., §§ 861a, 861b.

II.

Statute of the State the Validity of Which is Involved

The statute of the State of North Carolina, the validity of which is involved, is Section 121(e) of Chapter 127 of the State of North Carolina Public Laws of 1937, p. 208; C. S. 7880 (51) (e), which *verbatim* reads as follows:

> "Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars ($250.00), which license shall entitle such person, firm, or corporation to display such samples, goods, wares, or merchandise in any county in this State."

The pertinent provisions of said Chapter 127 are appended hereto (Exhibit A).

III.

Date of Judgment and Date of Application for Appeal.

The judgment sought to be reviewed is a final judgment of the Supreme Court of the State of North Carolina (216

N. C. 114, 3 S. E. (2d) 292), the highest court of that State in which a decision in the suit could be had. The date of said judgment was June 16, 1939. A petition to rehear and to correct certain errors therein was duly filed by appellant and allowed by the said Supreme Court on September 30, 1939. The said Supreme Court disposed of the petition to rehear by decision. (—— N. C. ——, 6 S. E. (2d) 893) filed therein on February 2, 1940, on which date the judgment in the above entitled cause became final for the purpose of appeal to and review by the Supreme Court of the United States.

Citizens Bank v. *Opperman*, 249 U. S. 448;
Chicago G. W. R. R. Co. v. *Basham*, 249 U. S. 164.

The date upon which the application for appeal is presented is April 29, 1940.

IV.

Nature of the Case and of the Rulings of the Court Below.

The nature of the case and of the rulings of the Supreme Court of the State of North Carolina, which are deemed to bring the case within the jurisdictional provisions relied on, are as follows:

This suit was instituted by appellant in the Superior Court of Wake County, North Carolina, to recover the amount of tax collected by the appellee, as Commissioner of Revenue for the State of North Carolina, from the appellant in purported compliance with the said statute and paid by appellant involuntarily and under protest on the ground that the said statute is repugnant to the Constitution of the United States.

The complaint and the amended complaint allege that the said statute is unconstitutional, null, and void in that it contravenes, *inter alia*, Section 8 of Article I of the Consti-

tution of the United States and Section 1 of the Fourteenth Amendment.

Issue was joined by the answer which denies that the said statute is invalid and unconstitutional, concedes that the amount sought to be recovered was demanded and collected from the appellant as a license tax levied under the said statute but sets up as a separate defense that the statute levied a tax upon the appellant for the use of space in a hotel in the City of Winston-Salem for the display of appellant's goods, wares and merchandise, and admits many of the material factual allegations of the complaint.

The facts, all of which were either stipulated or admitted by the answer, are as follows:

The appellant, a New York corporation, is engaged in the retail apparel specialty store business in New York City, and is not a "regular retail merchant in the State of North Carolina" within the meaning of the statute, has no store or other place of business, officer, or agent therein, and is not domesticated in North Carolina.

On February 9, 1938 the appellant rented a room in a hotel in Winston-Salem, North Carolina, in which for a period of a few days it displayed some samples of its merchandise to local residents who were invited by notices previously mailed from appellant's office in New York. The articles on display were merely samples, which were exhibited to obtain orders for the retail sale of similar goods for future shipment in interstate commeree. No merchandise was sold or delivered, and none was offered or available for that purpose.

The orders were taken subject to acceptance or rejection at appellant's office in New York. All orders were forwarded to appellant in New York, and those which were accepted were filled by shipment of the merchandise from New York direct to the customers by mail or other regular channels of interstate commerce. No merchandise was

sent to any employee, agent, or representative of appellant in North Carolina.

No payment or deposit on account of the purchase price was made or received at the time of the display. Invoices were sent from New York direct to the customers, who remitted payments to appellant's New York office.

There is no issue as to the character of the merchandise, which was a legitimate subject of interstate commerce; and the tax does not purport to be exacted in the exercise of the police power of the State (compare *Brennan* v. *Titusville*, 153 U. S. 289, 298-299).

The Federal questions raised by the pleadings were presented by appellant on the trial of the action in the Superior Court of Wake County, the court of first instance, which rendered judgment in favor of the appellant for the full amount sought to be recovered. No opinion was written.

On appeal to the Supreme Court of the State of North Carolina, the highest court of the State, appellant argued orally and in its brief that the statute was repugnant to the Constitution of the United States on the grounds set forth in its amended complaint. Said Supreme Court held that the statute did not violate the Constitution. It reversed the judgment of the said Superior Court and entered judgment against the appellant on June 16, 1939. An opinion was rendered (216 N. C. 114), with the chief justice dissenting and one associate justice not participating; a copy of the said opinion is appended hereto (Exhibit B).

In its opinion the said Supreme Court made the following rulings:

> that the State tax levied by the statute upon the display of samples and merchandise was not invalid as violative of the Commerce Clause of the Constitution of the United States (p. 115);

that "the Federal Constitution nowhere *expressly* prohibits the taxation of interstate commerce by a state, or even its direct regulation", but "merely gives to Congress the power to 'regulate' commerce among the states" (p. 115);

that "the express retention by the states of powers not delegated to the Federal Government argue strongly against the existence of any implied power of the Federal Government (growing out of the Commerce Clause) to strike down a state tax on commercial activity carried on within the borders of the taxing state" (p. 115);

that the said statute does not "discriminate against non-residents" (p. 116);

that "the taxed act is a local one, involving the use of purely local property" and "is a use tax, levied in the State of North Carolina upon profitable and commercial activity * * *" (p. 116);

The tax in no way hampers the movement of the samples, goods, etc., or of the merchandise sold, in interstate commerce. The tax in no way regulates the interstate or out-of-state activity of the person seeking to sell by display in North Carolina, * * *" (p. 117);

that "although such displaying by sample may ultimately result in orders which will flow into interstate commerce, such commercial activity cannot cloak itself in immunity from taxation merely by calling the magic words 'Interstate Commerce'. The use of North Carolina real estate for the purpose of displaying samples is commercially intended to result in interstate commerce, but this preliminary activity is merely a separate and distinct effort of the seller seeking * * * to stimulate the desire for the seller's goods" (p. 117);

that "the display use of hotel rooms and temporarily rented property here taxed is * * * a preliminary and incidental activity which, at the election of the

> seller, may or may not transpire prior to the beginning of the flow of events which constitute the movement of goods in interstate commerce * * * and is essentially intrastate and local in nature" (p. 117) * * * which "is not freed from state taxation" (p. 118).

The opinion of said Supreme Court incorrectly contained the statement that the statute was not challenged as violative of any provision of either the Federal or State constitutions other than the Commerce Clause (p. 115), although appellant had raised the issue that it violated Section 1 of the Fourteenth Amendment.

The appellant filed a petition to rehear, which was allowed by said Supreme Court on September 30, 1939, in which the appellant prayed for a rehearing of the appeal on the merits and for correction of the statement contained in the opinion.

On February 2, 1940 the said Supreme Court decided the said application to rehear as follows:

> It granted the petition insofar as it sought to correct the statement contained in its original opinion that the statute had been challenged only upon the ground that it violated the Commerce Clause of the Federal Constitution, and held that appellant had additionally challenged the enactment as in contravention of other clauses of the Constitution.
>
> By an evenly divided bench, one Justice not participating, it dismissed that portion of the said application which sought a rehearing of the appeal upon the merits.

Copies of both said opinions are appended hereto (Exhibit C).

The judgment of said Supreme Court thereby and thereupon became final for purposes of review by and appeal to the Supreme Court of the United States, and there was therein drawn in question the validity of said statute on the

ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

V.

Cases Believed to Sustain the Jurisdiction.

The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States:

Robbins v. *Shelby Taxing District*, 120 U. S. 489;
Asher v. *Texas*, 128 U. S. 129;
Stoutenburgh v. *Hennick*, 129 U. S. 141;
Brennan v. *Titusville*, 153 U. S. 289;
Stockard v. *Morgan*, 185 U. S. 27;
Caldwell v. *North Carolina*, 187 U. S. 622;
Rearick v. *Pennsylvania*, 203 U. S. 507;
Dozier v. *Alabama*, 218 U. S. 124;
Crenshaw v. *Arkansas*, 227 U. S. 389;
Rogers v. *Arkansas*, 227 U. S. 401;
Davis v. *Virginia*, 236 U. S. 697;
Real Silk Mills v. *Portland*, 268 U. S. 325;
Welton v. *State of Missouri*, 91 U. S. 275;
Corso v. *Maryland*, 120 U. S. 502;
Cheney Bros. Co. v. *Massachusetts*, 246 U. S. 147;
Sonneborn Bros. v. *Cureton*, 262 U. S. 506, 515;
Alpha Cement Co. v. *Massachusetts*, 268 U. S. 203, 217-218;
Norfolk & West. Ry. Co. v. *Sims*, 191 U. S. 441.

The *Robbins* case and the long line of decisions following it has been cited with approval in the following recent cases:

McGoldrick v. *Berwind-White Coal Mining Co.*, 308 U. S. — (decided Jan. 29, 1940); 60 S. Ct. 388;
Southern Pac. Co. v. *Gallagher*, 306 U. S. 167, 174;
Gwin, etc., Inc. v. *Henneford*, 305 U. S. 434, 437, 441;

South Carolina Hwy. Dept. v. *Barnwell Bros.*, 303 U. S. 177, 185, 186;
Cooney v. *Mountain States Tel. Co.*, 294 U. S. 384, 392;
Minnesota v. *Blasius*, 290 U. S. 1, 9;
Helson and Randolph v. *Kentucky*, 279 U. S. 245, 250;
Texas Transp. Co. v. *New Orleans*, 264 U. S. 150—also dissent at p. 157.

VI.

The Federal Questions Involved are Substantial.

The following is a statement of the grounds upon which it is contended that the Federal questions involved are substantial.

The issue herein is whether or not a State may, without exceeding the limitations and restrictions of the Constitution of the United States, require appellant, who is a merchant of another State, to obtain a license and to pay a so-called annual privilege tax for the privilege of temporarily displaying samples or merchandise within the State for the sole purpose of securing orders for the sale of such merchandise through the channels of interstate commerce.

The appellant challenges the validity and constitutionality of a statute of the State of North Carolina purporting to require such license from and to levy such tax against appellant, on the grounds that the statute imposes an unconstitutional burden on commerce between the States in contravention of Article I, Section 8 of the said Constitution, and deprives appellant of its property without due process of law and denies to it the equal protection of the laws in contravention of Section 1 of the Fourteenth Amendment.

The North Carolina tax is directly aimed at and discriminates against interstate commerce. Equality is not its theme.

The tax does not apply to a regularly established North Carolina retail merchant, and is therefore of necessity restricted to merchants engaging in interstate activity and maintaining no regular place of business in North Carolina.

In the language of Mr. Justice Stone in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 308 U. S. —, 60 S. Ct. 388, at p. 393:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it * * *."

The Supreme Court of the State of North Carolina in its opinion below cites no direct authority for sustaining the validity of the instant tax, but relies, as it states, upon the adoption by the Supreme Court of the United States of "a new approach to the problem of State taxation as it relates to interstate commerce" (216 N. C. 114, 120).

We frankly recognize that there has been a broadening of the authority of the States to impose upon interstate commerce a fair share of State tax burden, but to be permissible equality must be the theme of the taxation. In no instance has a tax been sustained where, as here, discrimination is its essence. This very type of State taxation has received the condemnation of the United States Supreme Court not only in *Robbins* v. *Shelby County Taxing Distxict, supra,* and a long line of decisions following and citing it, but also in its most recent pronouncements. (See V, *supra.*)

In *McGoldrick* v. *Berwind-White Coal Mining Co., supra;* which was decided subsequent to the decision of the court below herein, the United States Supreme Court held as follows:

"It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following Robbins *v.* Shelby County Taxing District, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, which have held invalid license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing State. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales. See Robbins *v.* Shelby County Taxing District, *supra*, 120 U. S. page 498, 7 S. Ct. page 596, 30 L. Ed. 694; Caldwell *v.* North Carolina, 187 U. S. 622, 632, 23 S. Ct. 229, 233, 47 L. Ed. 336, * * * It is enough for the present purposes that the rule of Robbins *v.* Shelby County Taxing District, supra, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate. Compare Robbins *v.* Shelby County Taxing District, supra, with Ficklen *v.* Shelby County Taxing District, 145 U. S. 1, 12 S. Ct. 810, 36 L. Ed. 601, see Howe Machine Co. *v.* Gage, supra; Wagner *v.* Covington, supra; * * *".

In the case at bar the statute falls precisely within the category "of such fixed-sum license tax" statutes.

It is noteworthy that the decision of the North Carolina Supreme Court herein did not meet with the approval of a majority of the members of that court. One of the seven members of the court did not participate, and on rehearing three of the remaining six Justices (including two who had previously concurred in the original prevailing opinion) sharply protested against the "forced" construction of the statute which "admits only of the interpretation that it is a tax on the privilege of taking orders for goods to be shipped in interstate commerce. The authorities are one in holding that such legislation is unconstitutional."

It is also noteworthy that the original prevailing opinion of that court sought to save the tax from repugnancy to the Federal Constitution on the theory that the tax imposed under the statute was a "use tax" affecting purely local activity, despite the fact that the statute itself specifically denominates it a "license tax", and in its practical operation it affects only the transaction of interstate commerce. On rehearing three of the six participating Judges condemned such theory in the following language:

> "Nor can the construction heretofore given to the statute save it from constitutional offense. If the tax imposed be a 'use tax', it is discriminatory."

The decision of the North Carolina Supreme Court herein is squarely in conflict with the decisions of the Supreme Courts of the States of South Carolina and Louisiana (the highest Courts of each of such States), rendered subsequent to the North Carolina decision, in suits to which appellant or its representative was a party, in which there were challenged the validity and constitutionality of the statute of each of such States, respectively, in all material respects identical with the North Carolina statute. The facts in all three cases are alike. The South Carolina and Louisiana Supreme Courts each held the corresponding statute of its State to be invalid on the ground that it was repugnant to the Commerce Clause of the Constitution of the United States, and both Courts expressly rejected the conclusion of the court below herein.

State v. *Yetter*, 192 S. C. 1, 5 S. E. (2d) 291;
State of Louisiana v. *Best & Co.*, — La. — (decided November 27, 1939), rearg. denied, — La. — (decided April 2, 1940).

Although no appeals are pending from the decisions of the said Supreme Courts and they are therefore not companion

cases, copies of the opinions of the South Carolina and Louisiana courts are appended hereto (Exhibits D and E).

The nominal amount of tax sought to be recovered in the suit herein is manifestly no measure whatsoever of its gravity and moment. This suit was instituted as a test case. Subsequent to its inception, appellant has been required to pay involuntarily and under protest substantial amounts of tax. The statute purports to levy not merely a State annual privilege tax of $250 under sub-section (e) of Section 121 thereof, but also under sub-section (h) thereof counties, cities or towns may levy a license tax on the same business in an amount not in excess of the annual license levied by the State; and many of the counties, cities and towns in the State of North Carolina have taken advantage of such legislative permission and levied taxes at the same rate. During the month of September, 1939, appellant was involuntarily obliged to pay approximately $2,500 to the counties and municipalities of the State of North Carolina in local privilege license taxes levied under or pursuant to the authorization contained in said subsection (h), in order that appellant might conduct five exhibits in the State, each lasting two or three days.

Measured in terms of its capacity to obstruct and to foster discrimination against interstate commerce the issues presented are of most serious and far reaching consequence, both as affecting private interests and the public welfare.

If the instant statute of the State of North Carolina is valid and does not infringe upon the constitutional restriction, each of the other States may enact similar legislation. Local merchants and others motivated by personal and purely selfish interests would seize with alacrity upon the opportunity to importune the several State legislatures and

local legislative bodies to enact similar allegedly "protective" statutes and ordinances.

The scope of the legislation might well be broadened. If a non-resident merchant may be taxed and required to obtain a license for the display of samples and merchandise in hotel rooms and rented houses for the purposes of securing orders for the purchase of goods to be shipped interstate, then by the same token he may be subjected to exactions and restrictions for exhibiting his samples and merchandise in other types of buildings or in going from door to door. Such taxation may also be extended to representatives of wholesalers and manufacturers displaying samples for the purpose of securing orders for the sale of their merchandise by interstate shipment. By degrees interstate barriers would be set up and interstate commerce throttled. In 1887, when *Robbins* v. *Shelby County Taxing District, supra,* was decided, 16 States required the payment of license taxes by drummers of various kinds. Mr. Justice Stone pointed out in a footnote to the decision in *McGoldrick* v. *Berwind-White Coal Mining Co., supra,* that almost 800 municipal ordinances directed at drummers had been adopted for the purpose of embarrassing competition with local merchants. He added that the court was cognizant of this trend and had declared invalid 19 such taxes following the *Robbins* decision. In the language of Mr. Justice Stone:

> "Lying back of these decisions is the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state."

The vital importance of maintaining the freedom of commerce across State lines was succinctly stated by the late

Mr. Justice Holmes in his "Collected Legal Papers", at pp. 295, 296, as follows:

> "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end."

A substantial Federal question is involved herein requiring review by the Supreme Court of the United States.

Dated, April 26, 1940.

Respectfully submitted,

STRAUSS, REICH & BOYER,
MANLY, HENDREN & WOMBLE,
Attorneys for Appellant.

EXHIBIT A.

The pertinent provisions of Chapter 127 of the State of North Carolina Public Laws of 1937 are as follows:

ARTICLE II.

SCHEDULE B.

LICENSE TAXES.

§ 100. Taxes under this article.—Taxes in this article or schedule shall be imposed as State license tax for the privilege of carrying on the business, exercising the privilege, or doing the act named, and nothing in this article shall be construed to relieve any person, firm, or corporation from the payment of the tax prescribed in this article or schedule.

* * * * * * * *

(b) Every State license issued under this article or schedule shall be for twelve months, shall expire on the thirty-first day of May of each year, and shall be for the full amount of tax prescribed: Provided, that where the tax is levied on an annual basis and the licensee begins such business or exercises such privilege after the first day of January and prior to the thirty-first day of May of each year, then such licensee shall be required to pay one-half of the tax prescribed other than the tax prescribed to be computed and levied upon a gross receipts and/or percentage basis for the conducting of such business or the exercising of such privilege to and including the thirty-first day of May, next following. Every county, city and town license issued under this article or schedule shall be for twelve months, and shall expire on the thirty-first day of May or thirtieth day of June of each year as the governing body of such county, city or town may determine: Provided, that where the licensee begins such business or exercises such privilege after the expiration of seven months of the current license year of such municipality, then such licensee shall be required to pay one-half of the tax prescribed other

than the tax prescribed to be computed upon a gross receipts and/or percentage basis.

(c) The State license thus obtained shall be and constitute a personal privilege to conduct the business named in the State license, shall not be transferable to any other person, firm, or corporation, and shall be construed to limit the person, firm, or corporation named in the license to conducting the business and exercising the privilege named in the State license to the county and/or city and location specified in the State license, unless otherwise provided in this article or schedule:

* * * * * * *

(e) All State taxes imposed by this article shall be paid to the Commissioner of Revenue, or to one of his deputies; shall be due and payable on or before the first day of June of each year, and after such date shall be deemed delinquent, and subject to all the remedies available and the penalties imposed for the payment of delinquent State license and privilege taxes: Provided, that if a person, firm, or corporation begins any business or the exercise of any privilege requiring a license under this article or schedule after the thirty-first day of May and prior to the thirty-first day of the following May of any year, then such person, firm, or corporation shall apply for and obtain a State license for conducting such business or exercising any such privilege in advance, and before the beginning of such business or the exercise of such privilege; and a failure to so apply and to obtain such State license shall be and constitute a delinquent payment of the State license tax due, and such person, firm, or corporation shall be subject to the remedies available and penalties imposed for the payment of such delinquent taxes.

(There follows an enumeration of the various businesses, privileges, etc. subject to the imposition of the license tax above referred to.)

§ 121. Peddlers.—(a) Any person, firm, or corporation who or which shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same,

or actually sells or barters the same, shall be deemed a peddler, except such person, firm, or corporation who or which is a wholesale dealer, with an established warehouse in this State and selling only to merchants for resale, and shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business, and shall pay for such license the following tax:

* * * * * * *

(c) Any person, firm, or corporation who or which sells or offers to sell from a cart, wagon, truck, automobile, or other vehicle operated over and upon the streets and/or highways within this State any fresh fruits and/or vegetables shall be deemed a peddler within the meaning of this section and shall pay the annual license tax levied in subsection (a) of this Act with reference to the character of the vehicle employed.

* * * * * * *

(d) Every itinerant salesman or merchant who shall expose for sale, either on the street or in a building occupied, in whole or in part, for that purpose, any goods, wares, or merchandise, not being a regular merchant in such county, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of transacting such business, and shall pay for such license a tax of one hundred dollars ($100.00) in each county in which he shall conduct or carry on such business.

* * * * * * *

*(e) Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commis-

* The tax imposed upon applicant was exacted in purported compliance with section 121 (e).

sioner of Revenue for the privilege of displaying such samples, goods, wares or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars ($250.00), which license shall entitle such person, firm, or corporation to display such samples, goods, wares, or merchandise in any county in this State.

* * * * * * *

(h) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of the annual license levied by the State. * * *

No county, city, or town shall levy any license tax under this section upon the persons so exempted in this section, nor upon drummers selling by wholesale: * * *

* * * * * * *

§ 181. Unlawful to operate without license.—When a license tax is required by law, and whenever the General Assembly shall levy a license tax on any business, trade, employment, or profession, or for doing any act, it shall be unlawful for any person, firm, or corporation without a license to engage in such business, trade, employment, profession, or do the act; and when such tax is imposed it shall be lawful to grant a license for the business, trade, employment, or for doing the act; and no person, firm, or corporation shall be allowed the privilege of exercising any business, trade, employment, profession, or the doing of any act taxed in this schedule throughout the State under one license, except under a state-wide license.

§ 182. Manner of obtaining license from the Commissioner of Revenue.—(a) Every person, firm, or corporation desiring to obtain a State license for the privilege of engaging in any business, trade, employment, profession, or of the doing of any act for which a State license is required shall, unless otherwise provided by law, make application therefor in writing to the Commissioner of Revenue, in which shall be stated the county, city, or town and the definite place therein where the business, trade, employment, or profession is to be exercised; the name and resident

address of the applicant, whether the applicant is an individual, firm, or corporation; the nature of the business, trade, employment, or profession; number of years applicant has prosecuted such business, trade, employment, or profession in this State, and such other information as may be required by the Commissioner of Revenue. The application shall be accompanied by the license tax prescribed in this article.

(b) Upon receipt of the application for a State license with the tax prescribed by this article, the Commissioner of Revenue, if satisfied of its correctness, shall issue a State license to the applicant to engage in the business, trade, employment, or profession in the name of and at the place set out in the application. No license issued by the Commissioner of Revenue shall be valid or have any legal effect unless and until the tax prescribed by law has been paid, and the fact of such shall appear on the face of the license.

* * * * * * *

§ 187. Engaging in business without a license.—(a) All State license taxes under this article or schedule, unless otherwise provided for, shall be due and payable annually on or before the first day of June of each year, or at the date of engaging in such business, trade, employment, and/or profession, or doing the act.

(b) If any person, firm, or corporation shall continue the business, trade, employment, or profession, or to do the act, after the expiration of a license previously issued, without obtaining a new license, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined and/or imprisoned in the discretion of the court, but the fine shall not be less than twenty per cent (20%) of the tax in addition to the tax and the costs; and if such failure to apply for and obtain a new license be continued, such person, firm or corporation shall pay additional tax of five per centum (5%) of the amount of the State license tax which was due and payable on the first day of June of the current year, in addition to the State license tax imposed by this article, for each and every thirty days that such State license tax re-

mains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the Commissioner of Revenue and paid with the State license tax, and shall become a part of the State license tax. The penalties for delayed payment hereinbefore provided shall not impair the obligation to procure a license in advance or modify any of the pains and penalties for failure to do so.

The provisions of this section shall apply to taxes levied by the counties of the State under authority of this Act in the same manner and to the same extent as they apply to taxes levied by the State.

(c) If any person, firm, or corporation shall commence to exercise any privilege or to promote any business, trade, employment, or profession, or to do any act requiring a State license under this article without such State license, he or it shall be guilty of a misdemeanor, and shall be fined and/or imprisoned in the discretion of the court; and if such failure, neglect, or refusal to apply for and obtain such State license be continued, such person, firm, or corporation shall pay an additional tax of five per centum (5%) of the amount of such State license tax which was due and payable at the commencement of the business, trade, employment, or profession, or doing the act, in addition to the State license tax imposed by this article, for each and every thirty (30) days that such State license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the Commissioner of Revenue and paid with the State license tax and shall become a part of the State license tax.

* * * * * * *

§ 189. Duties of Commissioner of Revenue.—(a) Except where otherwise provided, the Commissioner of Revenue shall be the duly authorized agent of this State for the issuing of all State licenses and the collection of all license taxes under this article, and it shall be his duty * * * to ascertain whether all persons, firms, or corporations in the various counties of the State who are taxable under the provisions of this article have applied for the State license and paid the tax thereon levied.

(b) The Commissioner of Revenue shall continually keep in his possession a sufficient supply of blank State license certificates, with corresponding sheets and duplicates consecutively numbered; shall stamp across each State license certificate that is to be good and valid in each and every county of the State the words "State-wide license," and shall stamp or imprint on each and every license certificate the words "issued by the Commissioner of Revenue."

(c) Neither the Commissioner of Revenue nor any of his deputies shall issue any duplicate license unless expressly authorized to do so by a provision of this article or schedule, and unless the original license is lost or has become so mutilated as to be illegible, and in such cases the Commissioner of Revenue is authorized to issue a duplicate certificate for which the tax is paid, and shall stamp upon its face "duplicate".

§ 190. License to be procured before beginning business.—(a) Every person, firm, or corporation engaging in any business, trade, and/or profession, or doing any act for which a State license is required and a tax is to be paid under the provisions of this article or schedule, shall, annually in advance, on or before the first day of June of each year, or before engaging in such business, trade, and/or profession, or doing the act, apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, trade, and/or profession, or doing such act, and shall pay the tax levied therefor.

(b) Licenses shall be kept posted where business is carried on. No person, firm, or corporation shall engage in any business, trade and/or profession, or do the act for which a State license is required in this article or schedule, without having such State license posted conspicuously at the place where such business, trade, and/or profession is carried on; and if the business, trade, and/or profession is such that license cannot be so posted, then the itinerant licensee shall have such license required by this article or schedule in his actual possession at the time of carrying on such business, trade, and/or profession, or doing the act named in this article or schedule, or a duplicate thereof.

(c) Any person, firm, or corporation failing, neglecting, or refusing to have the State license required under this article or schedule posted conspicuously at the place of business for which the license was obtained, or to have the same or a duplicate thereof in actual possession if an itinerant, shall pay an additional tax of twenty-five dollars ($25.00) for each and every separate offense, and each day's failure, neglect, or refusal shall constitute a separate offense.

EXHIBIT B.

Judgment Sought to be Reviewed.

IN THE SUPREME COURT OF NORTH CAROLINA, SPRING TERM, 1939.

No. 463.

BEST & COMPANY, INC.,

v.

A. J. MAXWELL, Commissioner of Revenue.

Appeal by defendant from Frizzelle, J., January 16 Term, 1939, Wake Superior Court. *Reversed.*

This is a civil action to recover $250.00 in taxes paid defendant, under protest, by virtue of Chapter 127, Sec. 121, subsec. e (Revenue Act, 1937), of the Public Laws of 1937. It is agreed by the parties that plaintiff is not a regular retail merchant in North Carolina and has no regular place of business in this State; but that plaintiff is a New York corporation having its principal office in New York City. It is likewise agreed that just prior to February 9, 1938, plaintiff rented for several days a display room in the Robert E. Lee Hotel, in Winston-Salem, and there displayed samples and secured retail orders for merchandise, later filled by shipment from the New York office, and that the tax here in dispute was levied upon this activity of plaintiff.

From a judgment for the plaintiff in the sum of $250.00, with interest, defendant appealed to this Court. The only exception and assignment of error is to the signing of the judgment.

Manly, Hendren & Womble and W. P. Sandridge for plaintiff.

Atty.-General McMullan and Asst. Attys.-General Bruton Wettach, and Bailey & Lassiter, amicus curiae, for defendant.

CLARKSON, *J.*:

The only question raised by this appeal: Is the State tax upon the display of samples, goods, etc., (a) in a hotel room, or house rented or occupied temporarily, (b) for the purpose of securing orders for the retail sale of such goods, etc., (c) by a person, firm or corporation, not a regular retail merchant in the State, invalid as violative of the Commerce Clause of the Constitution of the United States, Art. 1, Sec. 8 (3)? We think not.

The Act is not challenged as violative of any other provision of either the State or Federal Constitutions. The single question presented for our determination: Does the facts in this case violate the Constitutional grant to Congress of the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes?" This clause, and the remainder of the Federal Constitution, is significantly lacking in any prohibition of the taxation of commerce carried on within the borders of any state, and the right of the State to tax such intra-state commerce is not questioned. Further, the Federal Constitution nowhere *expressly* prohibits the taxation of interstate commerce by a State, or even its direct regulation. The Commerce Clause merely gives to Congress the power to "regulate" commerce among the States. It is well to remember that the Federal Government is one of granted power only; the Tenth Amendment to the Constitution (and North Carolina would not ratify the Constitution until the Bill of Rights had been adopted) declares, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states,

respectively, or to the people." The "Commerce Clause" has come to be written in capital letters rather by reason of more recent judicial interpretation of the clause than by the clear, expressed intent of the constitutional fathers. The express retention by the States of powers not delegated to the Federal Government argues strongly against the existence of any implied power of the Federal Government (growing out of the Commerce Clause) to strike down a state tax on commercial activity carried on within the borders of the taxing state. Unless the implied prohibition of taxes definitely burdening inter-state commerce (developed and given expression in Robbins *v.* Taxing District, 120 U. S. 489, Real Silk Hosiery Mills Co. *v.* Portland, 268 U. S. 325, and numerous interim cases) reaches to, and renders immune from state taxation, the commercial activity here taxed, the instant case represents a valid exercise of the state taxing power. The Supreme Court of the United States has long recognized the force of these considerations and has heretofore indicated that implied prohibitions growing out of the Commerce Clause must, necessarily, be reluctantly and rarely applied. "Whatever amounts to a more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of danger and meet it. This Court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effects upon it are clearly non-existent." Stafford *v.* Wallace, 258 U. S. 495 (521); Board of Trade *v.* Olsen, 262 U. S. 1 (37); see also Walton *v.* State of Missouri, 91 U. S. 275. Nor, by the same standard, can it be presumed that the Supreme Court of the United States will substitute its judgment as to the valid exercise of a state legislature's taxing power for that of the state legislature, unless the tax act "clearly" and "unduly" burdens the "freedom of interstate commerce." "* * * Property within the state, privileges granted by the state, and intra-state commerce done within the state are uniformly held proper subjects of state taxation." Powell. "Indirect Encroachments on Federal Authority by the Taxing Powers of the States, 5 Se-

lected Essays on Constitutional Law", at p. 391; also see pp. 418, 470.

It then becomes pertinent to determine whether it can be fairly said that the instant act, in this case, clearly constitutes a direct and undue burden upon interstate commerce. The measure is clear and concise; before it is applicable there must be the following requisites set forth in the law: (a) the act, i.e., the display of samples, goods, etc., (b) the place, i.e. in a hotel room or temporarily occupied house, (c) the mental element, or purpose, i.e., for the purpose of securing orders for retail sale of the goods, etc., and (4) the person, i.e., one not a regular merchant. In essence, the tax is one imposed upon anyone, not otherwise taxed as a retail merchant, who uses a North Carolina hotel room or temporarily occupied house, for commercial display purposes in the interest of retail sales. It is a use tax, levied in the State of North Carolina upon profitable and commercial activity which has otherwise escaped taxation and which, therefore, discriminates against no one but seeks to remove a discrimination previously existing against regular, taxed, retail merchants. Under this statute the act taxed must occur in North Carolina, and the room where the act transpires must be within the State. The taxed activity must be directed at the retail trade in North Carolina, seeking to reach personally the citizens and residents of this State. The measure does not in any way impinge upon the activities of the wholesale trade, nor does it discriminate against non-residents. All citizens and residents of North Carolina, and non-residents alike, (other than retail merchants who have already been taxed for their commercial activities) who engage in the taxable activity are liable for the tax. The taxed act is a local one, involving the use of purely local property. The tax in no way hampers the movement of the samples, goods, etc., or of the merchandise sold, in interstate commerce. The tax in no way regulates the inter-state or out-of-state activity of the person seeking to sell by display in North Carolina, nor does it in any way interfere with sales by sample by house-to-house canvassers. Finally, the measure leaves open to the seller the choice as to the manner of soliciting retail sales by display; only when he seeks to localize his

commercial activity by temporarily establishing himself at a particular rented and temporary location within this State in his activity in displaying samples and seeking orders subjected to taxation. Although such activity may be in the twilight zone of inter-state commerce, it does not enter that enchanted realm. Although such displaying by sample may ultimately result in orders which will flow into inter-state commerce, such commercial activity cannot cloak itself in immunity from taxation merely by calling the magic words "Interstate Commerce." The use of North Carolina real estate for the purpose of displaying samples is commercially intended to result in inter-state commerce, but this preliminary activity is merely a separate and distinct effort of the seller seeking, as in the instances of magazine and bill-board advertising, to stimulate the desire for the seller's goods. Western Live Stock *v.* Bureau of Revenue, 303 U. S. 250.

The display use of hotel rooms and temporarily rented property here taxed is not a usual, necessary, or essential part of a commercial, retail business. It is a preliminary and incidental activity which, at the election of the seller, may or may not transpire prior to the beginning of the flow of events which constitute the movement of goods in inter-state commerce. There is a striking analogy here to production, which has consistently been held not to constitute inter-state commerce. Carter *v.* Carter Coal Co., 298 U. S. 238. As Justice Brandeis, speaking for the Court in Chassaniol *v.* Greenwood, 291 U. S. 584 (587), so aptly remarked with reference to ginning and warehousing cotton, these are but "steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intra-state commerce." The use of North Carolina realty to display samples is likewise but a step "in preparation for the sale and shipment in interstate * * * commerce," and is essentially intra-state and local in nature. As was said by Justice Bradley in Coe *v.* Erroll, 116 U. S. 517 (525), "There must be a point of time when they cease to be governed exclusively by domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence

their final movement for transportation from the State of origin to that of their destination." Justice Bradley was there speaking of certain logs hauled to a river, but if the orders sought by plaintiff is substituted as the *res* under consideration the logic of the proposition is compelling that certainly not earlier than the actual placing of the orders with plaintiff can its commercial activity be considered as a part of interstate commerce. No phase of the question is better settled than the fundamental that the mere fact that the products of domestic enterprise are ultimately intended to become subjects of interstate commerce is not sufficient to stamp them with the immunities attaching to interstate commerce proper. Kidd *v.* Pearson, 128 U. S. 1 (21); Heisler *v.* Thomas Colliery Co., 260 U. S. 245 (259); Champion Refining Co. *v.* Corporation Commission, 286 U. S. 210 (235).

The displaying of samples in temporary quarters, here taxed, was peculiarly a local and intra-state act, outside the realm of interstate commerce, because such term can "never be applied to transactions wholly internal, between citizens of the same community, or to a polity and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community." Veazie et al. *v.* Moore, 14 How. 568 (573). Such a local, business activity which is separate and distinct from the transportation and intercourse which is interstate commerce is not freed from state taxation "merely because in the ordinary course such transportation or intercourse is induced by the business." Western Live Stock *v.* Bureau of Revenue, 303 U. S. 250 (253), and cases cited. In the same case, at p. 254, Justice Stone, speaking for the Court, reiterates the fundamental that, "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way'. Postal Telegraph-Cable Co. *v.* Richmond, 249 U. S. 252 (259), 39 S. Ct. 265, 266, 63 L. Ed. 590," and other cases cited. In the Western Live Stock cases, supra, the state privilege tax was upheld under a view which we think equally applicable here, to-wit, that "the burden on interstate business is too remote and too attenuated."

A casual reading of many of the recent pronouncements of the Supreme Court of the United States apparently indicates a gradual broadening of the Federal power over interstate commerce by liberalizing the definition of what falls within that category, with an accompanying, and even more desirable, broadening of the states' taxing power over matters touching the fringe of the garment of interstate commerce. This latter tendency is indicated by two complementary but distinct developments, the one marked by a narrowing of the compass of what constitutes a direct and undue burden on interstate commerce, and the other by a stricter and more rigid interpretation as to what constitutes discrimination against interstate commerce. See "Sales and Use Taxes: Interstate Commerce Pays Its Way," Warren & Schlesinger, 38 Col. Law Rev. 49 (Jan. 1938), for a collection of a number of these cases. These developments argue strongly for the validity of the instant tax.

In Coverdale *v.* Pipe Line Co., 303 U. S. 604, a state tax upon the production of power to drive gas into interstate commerce was approved. The displaying of goods here taxed is merely a similar preliminary activity seeking to "drive" orders into interstate commerce. In Nashville, C. & St. L. Ry. Co. *v.* Wallace, 288 U. S., 249, a state tax on storage of gasoline brought into the state through interstate commerce and ultimately used directly in interstate commerce was upheld, such a tax being considered too remote and too indirect a burden upon interstate commerce to justify its being stricken down. Here we have a similar situation, a local, commercial activity within North Carolina which follows the arrival of plaintiff's representative and precedes the sending of any orders to plaintiff. In Southern Pac. Co. *v.* Gallagher, 59 S. Ct., 389 (decided Jan. 30, 1939), the California Use Tax was upheld as applicable to equipment bought out of the State and brought into the State for installation on interstate, transportation equipment; there Justice Reed, for the Court, found a "taxable moment" at the point where the goods came to rest in the State and before they were installed on the interstate equipment. In the instant case there is no need for such search for a taxable moment, as the taxed activity was clearly localized in North Carolina; the displaying of the

samples was part of a carefully planned campaign, after an elaborate, personalized canvass by mail of large numbers of North Carolina citizens who were considered potential customers. As was pointed out in the Gallagher case, supra, "A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress." Also, it was there said: "The taxable event is the exercise of the property right in California"; here the taxable event is the exercise of the temporary property right in the hotel room or rented house to display samples commercially for retail purposes. Pacific Telephone & Telegraph Co. *v.* Gallagher, 59 S. Ct. 396, a companion case decided on the same day, again approved the California Use Tax as applied to supplies brought into the State for use in interstate telephone and telegraph communication.

Even earlier, in Eastern Air Transport, Inc. *v.* South Carolina Tax Commission, 285 U. S., 147, and in Henneford *v.* Silas Mason Co., 300 U. S., 577, the validity of the fundamental theory of the modern "use tax" had been approved; in the latter case, Justice Cardozo, for the Court, used these significant words in concluding the opinion: "A legislature has a wide range of choice in classifying and limiting the subjects of taxation. Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S., 232 (237); Ohio Oil Co. *v.* Conway, 281 U. S. 146 (159). The choice is as broad where the tax is laid upon one or a few of the attributes of ownership as when laid upon them all. Flint *v.* Stone Tracy Co., 220 U. S., 107 (158-9). * * * Such questions of fiscal policy will not be answered by a Court. The legislature might make the tax base as broad or as narrow as it pleased."

The Courts have not been alone in noting the economic imperative that "interstate business must pay its way." Students of taxation have become increasingly aware that a judicial overemphasis upon the doctrine of immunity of interstate commerce from state taxation amounts to discrimination against intra-state business. Lutz, H. L., Public Finance, 3rd ed., (1936), p. 326. State tax adminis-

trators have found it difficult to reach taxpayers in interstate commerce even when the plain and obvious intent was to tax them on the same basis as those engaged in intra-state commerce. R. M. Haig, "The Co-ordination of the Federal and State Tax Systems," Proceedings of the National Tax Association, (1932), p. 220; Marvel Stockwell, "The Co-ordination of Federal, State and Local Taxation," The Tax Magazine, (April, 1938), p. 198-9. None too soon, perhaps, the Supreme Court of the United States appears to have adopted a new approach to the problem of state taxation as it relates to interstate commerce, and approach involving a new emphasis upon the preservation of equality of tax burden between competing business enterprises. See William B. Lockhart, "The Sales Tax in Interstate Commerce," 52 Harvard Law Review (Feb. 1939), p. 617.

The tax here discussed is a part of a comprehensive, state tax program designed to reach and to tax equally and fairly all types of commercially remunerative activity which has the protection of our laws. Local mercantile businesses, which for the most part are small, are subject to taxation; the commercial activity of plaintiff, which is a comparatively large business enterprise, has heretofore escaped taxation in the State. If this tax fails in its effort to secure from plaintiff its proportionate contribution in taxes for the privileges and protections which it enjoys within the State, the immunity of plaintiff from taxes in this State will be complete. The reasoning leading to such a result we do not find persuasive. We do not find in the grant of power to Congress to regulate interstate commerce any implied prohibition which strikes down the tax here levied. Rather do we find in the reservation to the State of powers not granted to the United States (U. S. Constitution, X Amendment), coupled with the retention in the people of this State of "all powers not delegated" by our Constitution (N. C. Constitution, Art. 1, sec. 37), a mandate of organic law which is compelling in its implications. "In selecting the objects of taxation, in the classification of business and trades for this purpose, and in allocating to each its proper share of the expenses of government, the General Assembly has been given a wide discretion. The continued mainten-

ance of government itself as a great communal activity in behalf of all the citizens of the State is dependent upon an adequate taxing power." Tobacco Co. *v.* Maxwell, Commissioner of Revenue, 214 N. C., 367 (371-2).

For the reasons given, the judgment of the Court below is Reversed.

SEAWELL *J.* took no part in the consideration or decision of this case.

STACY, *C. J.*, dissents.

EXHIBIT C.

IN THE SUPREME COURT OF NORTH CAROLINA, FALL TERM, 1939.

No. 451—Wake.

BEST & COMPANY, INC.,

v.

A. J. MAXWELL, Commissioner of Revenue.

DECISION ON REARGUMENT.

Petition to rehear this case reported in 216 N. C., 114.

Strauss, Reich & Boyer; M. James Spitzer; Manly, Hendren & Womble; and W. P. Sandridge for Plaintiff, Petitioner.

Attorney General McMulland and Asst. Attorneys General Bruton and Gregory, for defendant, respondent.

Bailey & Lassiter, amicus curiae.

CLARKSON, *J.:*

The petition deals with a matter of form and also with one of substance.

The petition alleges an inadvertence in the interpretation of petitioner's position in that it was stated that petitioner challenged the act only upon the ground that it violates the Commerce Clause of the Constitution of the United States, whereas petitioner likewise challenged the enact-

ment a. "Offending against the privileges and immunities and the equal protection of the law clauses of the Constitution of the United States." It is contended by respondents that those matters were dealt with in substance, though without specific mention, in the body of the former opinion. However, to this extent the petition is allowed.

The petition further alleges error in the construction of the statute. The Court being evenly divided on this phase of the petition, Seawell, J., not sitting, the petition is sustained only to the extent above indicated.

Petition Dismissed in Part and Sustained in Part.

Winborne, J., concurring in the partial allowance of the petition and dissenting from its dismissal in part:

The opinion heretofore filed in this case imputes to the statute a meaning not warranted by its terms. The construction is a forced one. It is conceded on all hands that if the tax is laid on the privilege of taking orders for goods to be shipped in interstate commerce, the act offends against the Constitution of the United States.

The provision of the act is that: "Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares, or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars ($250.00), which license shall entitle such person, firm or corporation to display such samples, goods, wares, or merchandise in any county in this State." P. L. 1937, Chapter 127, Section 121, subsection (e).

This is the exact language of the statute. It admits only of the interpretation that it is a tax on the privilege of taking orders for goods to be shipped in interstate commerce. The authorities are one in holding that such legislation is unconstitutional.

Nor can the construction heretofore given to the statute save it from constitutional offence. If the tax imposed be a "use tax", it is discriminatory. Leonard *v.* Maxwell, 216 N. C., 89.

STACY, *C. J.*, and BARNHILL, *J.*, join in this opinion.

EXHIBIT D.

DECISION OF SUPREME COURT OF THE STATE OF SOUTH CAROLINA IN STATE v. YETTER, 192 S. C. 1; 5 S. E. (2d) 291.

STABLER, *C. J.*:

In February, 1938, the Legislature passed an act (40 Stat. at Large, 1569), requiring the payment of a license for the temporary display of samples, goods, wares or merchandise for the purpose of securing sales at retail. The defendant, a traveling salesman in the employ of Best & Company, a corporation, with its principal office and place of business in New York City, came to South Carolina in September, 1938, to secure for his employer orders for merchandise. With this object in view, he displayed his samples or goods in a room in the Columbia Hotel, in the City of Columbia, the room being rented or occupied for that purpose. The defendant took or accepted orders only, Best & Company shipping the goods direct to the customer, who paid for them by remittance direct to New York upon receipt of the merchandise and of bill therefor. Payment of the license tax was refused by the defendant, and he was thereupon arrested and tried in the Magistrate's Court for violation of the act. His defense was that the statute in question was a burden upon interstate commerce as prohibited by Section 8 of Article I of the Federal Constitution. Being convicted as charged, he appealed to the Court of General Sessions for Richland County, where the matter was later heard by his Honor, Judge Bellinger, who filed an order on July 12, 1939, holding the act to be unconstitutional, "in so far as it is attempted to be applied in this particular case". He accordingly reversed the judgment of the magistrate and ordered the defendant released.

Counsel for the appellant, the State, have filed with this Court a persuasive argument, and while we approve some of the things said, we are unable to agree with the contention that the circuit Judge, for the reasons urged, should be reversed. An examination of the decisions of the United States Supreme Court pertinent to the questions involved, those cited in the order and others not cited, as well as of the decisions of our own Court which may have a bearing thereon, satisfies us of the correctness of the conclusion reached by Judge Bellinger; and while we deem it unnecessary to add anything to what is said in his order, we will briefly refer to Best & Co. *v.* Maxwell (N. C.), 3 S. E. (2d) 292, which is strongly relied upon by counsel for the appellant. The North Carolina Supreme Court held, the facts and the questions there involved being practically the same as those in the case at bar, that the tax was not invalid as violative of the commerce clause of the Federal Constitution. While we have the greatest respect for the decisions of that Court, we are not in accord with its conclusions in the Maxwell case, in view of the applicable decisions of the United States Supreme Court, which necessarily control in questions of this kind. Furthermore, we have been advised that a rehearing has been granted in that case, thus leaving the Court's final action in doubt.

The order appealed from, which will be reported, is Affirmed.

Carter, Bonham, Baker and Fishburne, JJ., concur.

Order of Judge Bellinger.

This case comes before me on appeal from the Court of Magistrate Wm. A. Gunter of Richland County, from a conviction and sentence of the defendant charged with violation of Act No. 705, page 1569, Acts of the General Assembly of 1938. This pertinent part of the Act that the defendant is charged with violating is as follows:

"Section 1. License for Temporary Display of Samples, Goods, Wares or Merchandise Secure Sales at Retail—Be it enacted by the General Assembly of the State of South

Carolina: That every person, firm or corporation not being a regular retail merchant in the State of South Carolina who shall display samples, goods, wares or merchandise in any hotel room or in any room or house rented or occupied temporarily for the purpose of securing orders for the retail sale of such goods, wares or merchandise so displayed, shall apply for in advance and procure a State License from the South Carolina Tax Commission for the privilege of displaying such samples, goods, wares or merchandise, and shall pay an annual privilege tax of two hundred and fifty ($250.00) Dollars, which license shall entitle such person, firm or corporation to display such samples, goods, wares or merchandise in any County of this State: *Provided,* That this act shall not apply to displays of samples, goods, wares or merchandise at conventions, expositions or fairs."

The Act provides that one convicted of violating its terms shall be punishable by a fine not exceeding one hundred ($100.00) dollars, in addition to the payment of the license or by imprisonment not exceeding thirty (30) days.

The agreed facts are: That the defendant is not a regular retail merchant in the State of South Carolina; that at the times alleged in the warrant he was displaying samples, goods, wares or merchandise in a room in the Columbia Hotel, Columbia, South Carolina, which had been rented or occupied for the purpose of securing orders for the retail sale of such goods, wares or merchandise. It was testified to by the defendant, and not denied or contradicted by the State, that he was a resident of the State of New York; that his salary and expenses were paid direct from the New York office; that he only took orders for goods, which orders were forwarded to New York, to be filled and the goods were shipped by mail to the customer; that the defendant received no money or payment from the customer, and made no deliveries, but only solicited orders for goods desired from the samples displayed; that the persons invited to see the samples were those selected by the New York office and notified of the display of the goods by that office; that collection for the orders filled was left to the New York office.

Upon the trial of the defendant the Magistrate found him

guilty of violating the Act in question, and imposed sentence upon the defendant in accordance with the Act. It is from this judgment and sentence that the defendant appeals to this Court, on the following grounds: "That the Magistrate erred in finding the defendant guilty because the Statute in question, Act 705 of 1938, is unconstitutional, null and void, in that it interferes with interstate commerce and is in violation of Article I, Section 8, of the Constitution of the United States, and that it abridges the privileges and immunities of citizens of the United States and deprives the defendant of his liberty and property without due process of law and denies to the defendant equal protection of the laws in violation of Article XIV, Section 1, of the Constitution of the United States, and Article I, Section 5, of the Constitution of South Carolina."

The defendant has not argued the contention of the unconstitutionality of the Act under the due process clauses of the State and Federal Constitution; therefore, this Court will not consider the appeal upon those grounds.

Both appellant and respondent have relied upon the effect of "the interstate commerce clause" of the Federal Constitution as controlling the determination of this case. The only question to be decided is, whether or not Act No. 705, Acts of the General Assembly of 1938, imposes a burden or restriction under interstate commerce as prohibited by Article I, Section 8, of the Constitution of the United States?

Section 8, sub-division 3, of Article I of the Federal Constitution, delegates to the Congress of the United States the power "To regulate commerce with foreign nations, and among the several States and with the Indian Tribes." This commerce among the several States has been defined in the case of State *v.* Holleyman, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567, 11 L. R. A. (N. S.) 552, 24 L. R. A. (N. S.) 175, 2 A. L. R. 1094, thus: "Interstate commerce ordinarily consists of three elements, to wit: (1) The purchasing of merchandise by a resident of one State from a resident of another State: (2) the delivery of the articles of commerce; and (3) the transportation thereof. The purchase may be made by the buyer in person, *or through a*

traveling salesman of the non-resident, or by an order sent by the purchaser to the non-resident. The delivery may be made directly to the purchaser when the goods are sold, or when they reach their destination, in cases where they have been consigned to him." (Italics added.)

The facts in the case at bar squarely fit the foregoing definition. The defendant in the instant case was a traveling salesman for the non-resident seller; he took the order for the merchandise, forwarded it to the non-resident seller who in turn shipped it from the foreign State to the resident purchaser in this State and delivery was made by the carrier. Each element of the definition of interstate commerce is present in this transaction and as I view it, each step is a necessary link in the chain. It is argued that the tax as imposed is not for soliciting business or for taking orders but for the privilege of displaying the goods in a temporary show room and therefore does not impose a burden or restriction on interstate commerce. I cannot agree with this theory. Each act done by this defendant was a related and necessary step in the consummation of a transaction in interstate commerce. It is true that the defendant's principal does not have to come into this State to transact business and the clear intent of this Act is to discourage, to say the least, his doing so; however, it is his right to do so and the article of the Constitution here invoked was specifically included so that such business or commerce could be freely transacted between residents of the several States without hinderance and burden.

In the conclusion I have reached, I am amply supported by the decisions of our Supreme Court and the United States Supreme Court. In the Holleyman case, *supra,* the defendant and others were transporting liquor from North Carolina to their homes in this State after dark, in their own vehicles; they were arrested in this State for violation of a statute which prohibited transporting liquor in the State after dark. Upon appeal from the conviction, our Supreme Court, by divided opinion upheld the conviction, but upon rehearing before an *en banc* Court, this decision was reversed and likewise the judgment of the lower Court. The sole point in issue in that case, as here, was whether or not such a Statute was prohibited by the interstate com-

merce clause of the Federal Constitution and the final decision resolved that question in the defendant's favor. In the case just referred to, the defendant, a resident of South Carolina, purchased and received in North Carolina a package of liquor and was transporting same from that State to this State in his own vehicle. Our Supreme Court held that while the liquor was being transported and until the defendant arrived at his home, he was engaged in interstate commerce and to arrest Holleyman and confiscate the liquor was such a burden upon that commerce as is prohibited by the commerce clause of the Federal Constitution.

Under very similar facts as in the case at bar, the United States Supreme Court, in the case of Robbins *v.* Taxing District of Shelby County (Tennessee), 120 U. S. 489, 30 L. Ed. 694, held that a statute, similar to the one here involved, was unconstitutional as repugnant to the "Commerce Clause". In that case the Court fixes the point at which a transaction becomes interstate commerce, using this language: "But to tax the sale of such goods or the offer to sell them before they are brought into the State, is a very different thing and seems to me clearly a tax on interstate commerce itself. * * * *The negotiation of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made is interstate commerce.*" (Italics added.)

In the case at bar, the displaying of samples of goods to be purchased in another State is an element in the negotiation for the sale, and, therefore, constitutes interstate commerce. With facts and Statutes very similar to the case at bar, the United States Supreme Court has consistently held those Statutes to be restrictions upon interstate commerce and therefore invalid. Stockard *v.* Morgan, 185 U. S. 27, 46 L. Ed. 785; Crenshaw *v.* Arkansas, 227 U. S. 389, 57 L. Ed. 565; Brennan *v.* City of Titusville (Penn.), 153 U. S. 288, 38 L. Ed. 719; State *v.* Emert, 130 Mo. 241, 23 Am. St. Rep. 874, 156 U. S. 296, 39 L. Ed. 430; Real Silk Hosiery Mills *v.* City of Portland (Oregon), 268 U. S. 325, 69 L. Ed. 982.

In the case of State *v.* Emert, *supra*, the Missouri Supreme Court held: "the sale of goods which are in another

State at the time of sale for the purpose of introducing them into the State, in which a regulation concerning their sale is made, is interstate commerce, and a tax upon them before they are brought into the State is a tax on interstate commerce. The imposition of a license tax on the person so making sale of them is also, in effect, a tax upon the goods, and illegal, because the State cannot tax goods beyond its jurisdiction; but as soon as the goods are brought into the State, and have become a part of its general mass of property, they become taxable the same as other similar property within the State." This holding of the Missouri Court was affirmed by the United States Supreme Court.

In Brennan *v.* City of Titusville, *supra,* the very question here presented was passed upon, and it was there held that a regulation as to the manner of sale of subjects of commerce, whether by sample or not, and by exhibiting samples is a regulation of commerce and that an ordinance requiring a license of a manufacturer of goods in carrying on his business in another State by sending his agent there to solicit orders, conflicts directly upon the provisions of the Federal Constitution regulating interstate commerce which is within the exclusive jurisdiction of the Federal Government. Mr. Justice Brewer, delivering the opinion of the Court said: "It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free." Again quoting from the same authority: "It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode

ceased to be possible. And, notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent regulate it." The Court reviewed numerous decisions in which it had passed upon similar questions and held that the license tax imposed in that case upon the defendant was a direct burden on interstate commerce and was, therefore, beyond the power of the State.

The respondent relies strongly upon the case of Best & Company Inc. *v.* A. J. Maxwell, Commissioner of Revenue, decided by the Supreme Court of North Carolina and filed June 16, 1939, to sustain the validity of our Act on the same subject. The main provisions of the North Carolina Act are identical with ours, and the North Carolina Court held their Act to be constitutional. Notwithstanding in that case, like in the case before this Court, the facts were similar. The North Carolina decision was not concurred in by the entire court, but I have not before me the dissenting opinion.

The writer holds the decisions of our sister State in the highest regard, but he finds himself unable to concur in the opinion of that Court upon the question here presented. In view of the numerous decisions of the United States Court, holding that the Statute of this kind under the facts in the instant case places a burden upon interstate commerce in contravention of the Federal Constitution, he finds himself in disagreement with the North Carolina decision.

There being a Federal question here involved, it is to the decisions of the United States Supreme Court that we must look for the proper interpretation of the commerce clause of the Federal Constitution upon the subject that is here being dealt with. And, reluctant as this Court is to declare an Act of our Legislature unconstitutional, it has no alternative, in view of the decisions heretofore cited, as well as others, than to hold that the Act in question, in so far as it is attempted to be applied to the defendant in the instant case under the facts here presented, clearly contravenes the Federal Constitution by placing a burden upon and attempting to regulate interstate commerce. It, there-

fore, follows that the defendant has, under the facts in this case, been convicted under a Statute which as to him is void.

The following cases from our own Court bear very strongly upon the question involved in the instant case: Jewel Tea Co. Inc. *v.* City of Camden, 171 S. C. 353, 172 S. E. 307. Zeigler *v.* Puritan Mills, 188 S. C. 367, 199 S. E. 420.

It is, Therefore, Ordered, Adjudged and Decreed, That Act No. 705, Acts of the General Assembly, 1938, page 1569, in so far as it is attempted to be applied in this particular case, is unconstitutional and of no force or effect.

It is Further Ordered, That the judgment of the Magistrate's Court in the instant case be, and the same is, reversed, and that the defendant be discharged.

EXHIBIT E.

DECISION OF SUPREME COURT OF THE STATE OF LOUISIANA IN STATE OF LOUISIANA v. BEST AND COMPANY, — La. — (decided November 27, 1939); Rearg. Denied April 2, 1940, — La. —.

#35367.

STATE OF LOUISIANA

versus

BEST AND COMPANY.

Appeal from the First Judicial District Court, Parish of Caddo. Hon. E. P. Mills, Judge.

ODOM, J.:

The defendant is a New York corporation and operates a retail and mail-order store in New York City. It has no place of business in Louisiana, nor does it operate any store here. In October, 1938, one of its representatives brought into the City of Shreveport, this state, samples of

ladies' and children's wearing apparel, and displayed them in rooms leased for that purpose from a hotel. Defendant's representative did not sell and deliver, or offer to sell and deliver, any of the articles of merchandise on display. The articles of merchandise were samples and were displayed for the sole purpose of securing orders for the retail sale of similar merchandise to local customers for future delivery from the store in New York City.

Mr. Yetter, defendant's representative, was not authorized to deliver any merchandise or to accept payment therefor. All he was authorized to do, and all that he did, was to display the samples, take orders, and forward them to the defendant in New York City. The orders were subject to the approval of the defendant at its home office. If the orders were accepted, the goods were either charged to the accounts of the customers or shipped to them C. O. D., at their option. Nothing was shipped to Mr. Yetter for delivery, but all shipments were made to the customers direct. The display of samples was advertised by the mailing of cards to prospective customers by the representative of the company, the cards setting forth the dates of display. The defendant does not manufacture the articles sold. But the articles are taken from its general stock in New York City and are shipped from there direct to the customers. These are the admitted facts.

The State ruled defendant to show cause why it should not pay a license tax of $250.00, alleged to be due under Section 17, Act 33 of 1938, "for the privilege of displaying samples, models, goods, wares or merchandise in the Hotel Washington-Youree at Shreveport, Louisiana, for the purpose of securing orders for the retail sale of such goods, wares or merchandise, either for immediate or future delivery." (Quotation from State's petition.)

That part of the section of the statute under which this license tax is demanded reads as follows:

"Provided further, that every person, firm or corporation, not being a regular retail merchant in the State of Louisiana, who shall display samples, models, goods, wares or merchandise in any hotel, hotel room, store, store-house, house or other place, for the purpose of securing orders for

the retail sale of such goods, wares or merchandise, or others of like kind or quality, either for immediate or future delivery, shall apply for and procure, at least thirty days in advance, a license from the Collector of Revenue for the privilege of displaying such samples, models, goods, wares or merchandise, and shall pay, in addition to all other taxes and licenses, a license tax therefor of $250.00 for each sixty days of any such display. This paragraph shall not apply to those making house to house or personal calls displaying samples and taking orders for shipment directly from the manufacturer."

Defendant in its answer admitted the facts as above stated. The defense set up in its answer is that the only business it transacted in this state was to display its samples, take orders for goods, send the orders to New York City, there to be accepted or rejected; that, if accepted, the goods were to be shipped direct to the customers, the price to be remitted direct to the company in New York City by the customer; that such business is interstate commerce; that the State of Louisiana is without power or authority to require a license fee or to levy a tax on the privilege of engaging in such business; that such a tax is an undue burden upon, and an interference with, interstate commerce, and is therefore in conflict with the provisions of Section 8, Article I, of the Federal Constitution, which provides that Congress shall have power, "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."

There was a judgment in the Court below decreeing that the statute is unconstitutional. The State appealed.

The purpose of the law here under attack is to require all persons, firms, or corporations not being retail merchants in this State to pay a license tax for the privilege of displaying samples, models, goods, wares, or merchandise in a hotel, hotel room, or storehouse, or other place, when the purpose of making such display is to secure "orders for the retail sale of such goods, wares or merchandise, or others of like kind or quality, either for immediate or future delivery".

The license tax is not imposed for the bare purpose of displaying samples of merchandise in a hotel room or other place, but for the privilege of so displaying such wares "for the purpose of securing orders for the retail sale of such goods, wares or merchandise."

Counsel for the State advanced a theory that, because the samples, goods, or merchandise displayed by the defendant came to rest in Shreveport and were there displayed, and because the merchandise was not then in interstate commerce, the making of the display was a local business and subject to taxation in this state. He rests his argument upon the well-recognized principle, which is stated in 12 Corpus Juris, Section 153, page 109, as follows:

"In the exercise of its power wholly to exclude foreign corporations, or in its discretion, to permit them to do business within the state under such conditions and restrictions as it sees fit to impose, a state may exact a license fee or tax from foreign corporations engaged in interstate commerce for the privilege of doing local or domestic business within the state, and a statute or ordinance imposing such a tax is valid when it is so worded as to cover only intrastate commerce, as where it expressly excepts interstate business."

Counsel cites the above quoted text in support of his argument that the state may exact a license tax or fee from a foreign corporation engaged in interstate commerce "for the privilege of doing local or domestic business within the state." The defendant is a foreign corporation and is engaged in interstate commerce, and the state could unquestionably exact of it a license tax for the privilege of doing a local or domestic business. So that the rule announced above would be applicable to the case at bar if it were true, as counsel argues, that the defendant, by displaying its samples in a room at the hotel, thereby engaged in a local business. But, by displaying the samples under the circumstances and for the purpose disclosed by the agreed statement of facts, defendant did not engage in a local or domestic business.

The reason is obvious, and is this: that the displaying of the samples, which admittedly was for the purpose of securing orders for the sale of merchandise then in another state, was but a step—the first step—made in furtherance of interstate transactions. The defendant had no merchandise for sale in this state and made no sales here. The goods which it had for sale, and which its representative here offered for sale, were in the City of New York. Defendant's representative here did not, and could not under the authority delegated to him by his principal, consummate sales. All he was authorized to do, and all he did, was to solicit and take orders from local customers for the sale of articles of wearing apparel selected from the samples displayed, and send the orders so taken to defendant's main office in New York City, where the goods for sale were kept. The orders were either accepted, the goods were shipped direct from the store in New York to the customer in Louisiana. These being the undisputed facts, the defendant was engaged in interstate commerce. We can see nothing in such transactions that can be regarded as local business. Our conclusions in this respect are supported by a long and unbroken line of decisions by the United States Supreme Court and by this Court.

The displaying of samples was but a means of exhibiting to prospective customers the kind and quality of the wares which defendant had for sale, to get them interested and to induce them to make orders. The goods and merchandise displayed were property which came to rest in this state when deposited for exhibit in the hotel room. But they were not deposited there for sale. They were means and instrumentalities devoted solely to the end of furthering defendant's interstate business. The displaying of them in no proper sense constituted, or contributed to, the doing of a local business.

Counsel for the State concedes, as indeed he must, that, if defendant's representative had taken the samples of merchandise with him from door to door and had displayed them in that way in order to induce prospective customers to make orders and had taken orders just as he did at the hotel room and for the same purpose, the business thus transacted would not be subject to the license tax levied by

the act. But he thinks there is a distinction between the exhibiting of samples at a hotel room for the purpose of securing orders and the exhibiting of them from door to door for the same purpose. We do not concur in counsel's view. On principle it matters not where samples are displayed if the purpose of displaying them is to induce prospective customers to order goods to be shipped in interstate commerce. If the entire transaction is interstate in character, then each and every step taken in furtherance thereof is likewise interstate in character. The act of exhibiting samples of goods to induce customers to take orders for the sale of merchandise is not separable from the other steps taken to consummate the interstate business. Each step is a part of one complete transaction.

In Cheney Bros. *v.* Massachusetts, 246 U. S. 147, 38 Sup. Ct. 295, the Supreme Court decided the point raised and stressed by counsel for the State in the case at bar. The court was there concerned with an excise tax imposed by Massachusetts on each of seven foreign corporations on the ground that they were doing a local business in that state. Cheney Bros. was a Connecticut corporation, whose general business was manufacturing and selling silk fabrics. It maintained at Boston a selling office with one office salesman and four other salesmen who traveled through New England taking orders. The salesmen solicited and took orders subject to the approval of the home office in Connecticut. If the orders were approved by the home office, the goods were shipped direct to the purchasers. Cheney Bros. kept no stock of goods in Massachusetts, "but only samples used in soliciting and taking orders." No other business was transacted in Massachusetts. The Supreme Court said:

"We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation."

This case is practically on all-fours with the case at bar. The case of Ozark Pipe Line Corporation *v.* Monier, et al., 266 U. S. 555, 45 Sup. Ct. 184, is like it in principle. The Ozark concern was a Maryland corporation which maintained its principal office in the State of Missouri, where it kept its books and bank accounts; and from its office there it paid its employees within and without the state, purchased supplies, employed labor, maintained telephone and telegraph lines, entered into contracts for transportation of crude oil, and carried on various other activities connected with, and in furtherance of, its pipe-line operations. It owned and operated a pipe line, extending through Oklahoma and Missouri to a certain point in Illinois, through which pipe line it conveyed crude petroleum. It was therefore engaged in interstate commerce.

The State of Missouri attempted to collect from it an annual franchise tax, the contention in justification of the tax being that the corporation was also engaged in doing local business; that its ownership and use of property other than the pipe line—such as telephone and telegraph lines, pumping stations, passenger and truck automobiles, etc.—in the State of Missouri, and its various acts and activities within that state amounted to the operation of a strictly local business.

It was conceded by the state that the operation of the pipe line, through which crude oil was transported from Oklahoma, through Missouri, to a point in Illinois, was interstate business. The Court said:

"The tax is one upon the privilege or right to do business (State, ex rel. *v.* State Tax Commission, 282 Mo. 213, 234, 221 S. W. 721) and if appellant is engaged only in interstate commerce it is conceded, as it must be, that the tax, so far as appellant is concerned, constitutionally cannot be imposed. It long has been settled that a state cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on. * * * (citing authorities) * * * Plainly, the operation of appellant's pipe line is interstate commerce and beyond the power of state taxation."

Referring to the question whether the owning of property in the State of Missouri, which was used in connection with the principal business engaged in by the corporation, the court said:

"The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of its interstate business, and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected."

The defendant in the case at bar was unquestionably engaged in interstate commerce. In the case of Robbins *v.* Taxing District, 120 U. S. 489, 7 Sup. Ct. 592, 30 Law Ed. 694, decided in 1887, the Court said:

"The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

In Real Silk Hosiery Mills *v.* Portland, 268 U. S. 325, 45 Sup. Ct. 525, 69 Law Ed. 982, the Supreme Court quoted with approval the above language from the Robbins case. And in Crenshaw *v.* Arkansas, 227 U. S. 389, 33 Sup. Ct. 294, 57 Law Ed. 565, the Court referred to the Robbins case as "The leading case", and said that it had been strictly adhered to since its decision.

In McClellan, Tax Collector *v.* Pettigrew, 44 La. Ann. 356, 10 So. 853, Pettigrew, the defendant, was the agent of the Seth Thomas Clock Company, a corporation domiciled in the State of New York, and solicited orders for the sale of clocks, with a view of introducing them into this State. He exhibited samples, obtained orders, forwarded them by

mail to the clock company in New York, which shipped the clocks to points convenient to the purchasers in Louisiana. The clocks were delivered by the company at its own expense. The State sought to collect a license tax from Pettigrew, the agent of the corporation. The Court followed the Robbins case, *supra*, and held that Pettigrew was not liable for the license tax because the soliciting of the orders by him in this state, for the sale of clocks in another state, did not constitute a sale of the clocks but a negotiation for the sale, and that the clause of the Constitution of the United States which declares that Congress shall have the power to regulate commerce among the several states extends to negotiations for the sale of manufactured articles solicited in another state. It was held, to abstract from the syllabus, that:

"any license tax imposed upon an agent or solicitor for soliciting orders for said goods, by sample, is in violation of said clause of the Constitution of the United States."

We quote the following text from 15 Corpus Juris Secundum, Section 18, page 279:

"Transactions of interstate commerce comprehend every negotiation, initiatory and intervening act, contract, trade, and dealing between citizens of any state or territory, or the District of Columbia, with those of another political division of the United States, which contemplates and causes an importation into the state, either of goods, of persons, or of information."

As to the general rule that a state is prohibited from levying a tax on interstate commerce, this Court, in State *v.* Schofield, 136 La. 702 (718), 67 So. 557, said:

"And it is well settled that a license imposed upon the agent of a foreign corporation selling articles of commerce which at the time of the sale are in another state operates in restraint of interstate commerce, and in violation of the interstate commerce clause of the Constitution of the United States." (Citing Tax Collector *v.* Pettigrew, *supra*, and numerous decisions by the Supreme Court of the United States.)

In State *v.* Read & Nott, 178 La. 530, 152 So. 74, it was held that a license or occupational tax, as applied to a local representative of a non-resident commercial firm who solicits orders for merchandise to be shipped direct to buyers, was unconstitutional, being an unauthorized burden on interstate commerce. In that case, the agent of the non-resident commercial firm kept an office in the City of Shreveport, where he displayed samples and took orders, and also solicited orders as a drummer within his district. The orders were sent direct to the principal without the state, where they were accepted, filled, and shipped direct to the persons by whom they were ordered.

Act 8 of the Third Extra Session of 1935, denies to any foreign corporation doing business in this state, the right to present a judicial demand before any of the courts of the state unless and until it pays all license and excise taxes required of such corporations doing business in the State. In Graham Mfg. Co. *v.* Rolland, 191 La. 757, 186 So. 93, this Court held that this law was not applicable to a foreign corporation having no office or business establishment of any kind in Louisiana, which employs traveling salesmen who come into the state and solicit and receive orders for merchandise. The Graham Manufacturing Company is a Connecticut corporation, and through one of its salesmen sold merchandise to the defendant Rolland. Rolland failed to pay for the goods, and the plaintiff brought suit. Rolland sought to have the suit dismissed on the ground that plaintiff had not paid its license tax. The facts were that orders were received in this state by plaintiff's representative, the orders were sent by mail by the traveling salesman to the office of the corporation in Connecticut, where the orders were accepted or rejected. When the orders were accepted, the goods were shipped to the customers who ordered them. In holding that the statute referred to was not applicable to the plaintiff, this Court said:

"It is well settled that a state statute imposing a license tax upon foreign corporations doing business in the state is not applicable to a foreign corporation which has no office or place of business in the state, and which sells goods in the state only on orders received through traveling

salesmen—the orders being accepted in the foreign state, and the goods being shipped from that state. Such a state statute cannot be construed so as to apply to such business as we have described because such business is interstate commerce, and is therefore exempt from state taxation by the commerce clause in the Constitution of the United States, Article I, Sec. 8, Cl. 3, U. S. C. A. Robbins *v.* Taxing District of Shelby County, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694; Caldwell *v.* State of North Carolina, 187 U. S. 622, 23 S. Ct. 229, 47 L. Ed. 336; International Text-Book Company *v.* Pigg, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; People's Tobacco Co. *v.* American Tobacco Co., 246 U. S. 79, 38 S. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537; Real Silk Hosiery Mills *v.* City of Portland, 268 U. S. 325, 45 S. Ct. 525, 69 L. Ed. 982, McClellan *v.* Pettigrew, 44 La. Ann. 356, 10 So. 853; Pegues *v.* Ray, 50 La. Ann. 574, 23 So. 904; State *v.* Schofield, 136 La. 702, 67 So. 557; State *v.* Paramount-Publix Corporation, 178 La. 818, 152 So. 534."

Each of the cases cited above is pertinent to the issues involved in the case at bar. It is unnecessary to review them further.

We find no merit in counsel's suggestion that the tax imposed by Section 17, Act 33 of 1938, partakes of the nature of a use tax. The tax is a license tax pure and simple, and it was so designated in the State's petition, wherein it was alleged that the defendant was due the State $250.00, "being the license tax due under the provisions" of said act.

For the reasons assigned, the judgment appealed from, declaring unconstitutional that portion of Section 17, Act 33 of 1938, which requires every person, firm, or corporation, not being a regular retail merchant in the State of Louisiana, to pay a license tax for the privilege of displaying samples, models, goods, wares, or merchandise in any hotel, hotel room, store, storehouse, house, or other place, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise, or others of kind or quality, either for immediate or future delivery, is affirmed.

Blank Page